85-244

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1985

ADVENTURERS WHITESTONE CORPORATION,
Appellant,

vs.

THE CITY OF NEW YORK,
Appellee.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

(1) Is a statute of the State of New York, namely *General Municipal Law*, Sec. 3-a(2), repugnant to the just compensation provisions of the Fifth Amendment to the Constitution of the United States when it is held that as post decree (or judgment) interest on a condemnation award is not constitutionally required, the rate of interest provided for in said statute may not be challenged on just compensation grounds for the period subsequent to the Final Decree of the trial court to the date of payment of the condemnation award.

(2) Is the said *General Municpal Law*, Sec. 3-a(2) also repugnant to the just compensation clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States, when proof of an interest rate sufficient to afford just compensation, as distinguished from the statutory interest rate, is required to be submitted prior to the Final Decree of the trial Court, despite said Final Decree being modified on appeal, thus, under New York law *(In re Chrystie Street in City of New York*, 264 N.Y. 319), creating a new final decree, contrary to the principle set forth in *Kirby Forest Industries v. United States*, – U.S. – , 104 Supreme Court 2187 (1984).

(3) If the answer to the first question is in the affirmative, has the plaintiff also been deprived by said statute of the due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, if it is limited to challenging the statutory rate of interest provided for in *General Municipal Law*, Sec. 3-a(2) during the proceeding prior to the Final Decree (or judgment) thus compelling it to speculate on how long the delay in payment will be and what the constitutional rate of interest will be during that unknown future period.

PARTIES

The parties in the proceeding in the Court whose judgment is sought to be reviewed is the City of New York, as defendant (appellee) and Adventurers Whitestone Corporation as plaintiff (appellant). There are no parent companies, subsidiaries or affiliates of the appellant, Adventurers Whitestone Corporation.

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OPINIONS BELOW

1. *Adventurers Whitestone Corporation v. The City of New York,* (Myers J.), Supreme Court, New York County, dated September 16, 1983, denying the City's motion to dismiss the complaint and granting Plaintiff's cross motion for summary judgment, Index No. 42660.

2. *Adventurers Whitestone Corporation v. The City of New York,* Appellate Division of the Supreme Court, First Department, modified on the law by vacating the award of attorney's fees, but otherwise affirmed, 102 A.D.2d 769, 477 N.Y.S.2d 19, (1984) and granting the City's motion for leave to appeal to the Court of Appeals – A.D.2d –, – N.Y.S.2d –.

3. *Adventurers Whitestone Corporation v. The City of New York,* New York State Court of Appeals, 65 N.Y.2d 83, 489 N.Y.S.2d 896, 479 N.E.2d 241.

JURISDICTION

(i) This is a condemnation proceeding in which the New York State Court of Appeals found that post decree (or judgment) interest on the award is not constitutionally required as part of the just compensation, but is fixed by the *General Municipal Law,* Sec. 3-a(2), a State of New York statute. That statute, as such, is repugnant to the Fifth Amendment to the Constitution and the laws of the United States.

The Court further held that proof as to the validity of the statutory interest rate had to be submitted prior to the Final Decree of the trial Court, despite the modification of that decree on appeal some three years later, creating a new decree. That statute, as such, is repugnant to the Fourteenth Amendment to the Constitution of the United States.

(ii) The judgment of the New York State Court of Appeals was entered on May 16, 1985. The Notice of Appeal was filed with the clerk of this Court with a copy filed with the clerk of the New York State Court of Appeals on August 6, 1985.

(iii) The statutory provision believed to confer jurisdiction of the appeal on this Court is 28 U.S.C. Sec. 1257(2).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the just compensation provision of the Fifth Amendment to the Constitution of the United States, which reads:

> "Nor should private property be taken for public use, without just compensation";

and that portion of the Fourteenth Amendment to the Constitution of the United States, which reads:

> "---; nor shall any State deprive any person of life, liberty, property, without due process of law; ---."

STATEMENT OF THE CASE

This suit for additional interest grows out of a condemnation proceeding instituted by the appellee, the City of New York, for the College Point Industrial Park pursuant to Chapter 15, Title B of the Administrative Code of the City of New York. Title to appellant's property was acquired by the City of New York, instituting the proceeding, on April 14, 1974. The trial was held during the period September 15, 1976 through January 3, 1977, the Hearing on Objections on December 6, 1978 and the Final Decree was entered on July 18, 1979.

No issue was raised on the trial, or at any time during

the proceeding, with respect to the rate of interest to be paid on the award. This was not surprising since the New York State Court of Appeals, during the period leading to the Final Decree had affirmed that the six percent interest rate provided for in *General Municipal Law* Sec. 3-a(2) was lawfully adequate meeting the constitutional requirement of just compensation *(Evcandra Enterprises Inc. v. Nassau County,* 42 N.Y.2d 846 (1977)*)*. The Final Decree, prepared by the appellee, was silent as to any provision for interest. Because of appeals and cross-appeals, in which appellee was the successful party, in that it succeeded in increasing its award, and sustained it against appellee's appeal, the award to appellant was not ready to be paid until July 21, 1982, three years after the Final Decree and more than five years after the trial, when proof as to the quantum of the just compensation was adduced.

In the interim, the Supreme Court, Bronx County, on August 7, 1981, in *Matter of South Bronx Neighborhood Plan,* 110 Misc. 2d 571, 442 N.Y.S.2d 869, held that, by reason of the prevailing rate of interest, the *General Municipal Law* 3-a(2) no longer afforded the just compensation required by the Fifth Amendment to the Constitution, and retroactively fixed the rate of interest at 9% beginning with January 1, 1978. This was affirmed by the Appellate Division of the Supreme Court (89 A.D.2d 948, 454 N.Y.S.2d 566, (1982)), and affirmed by the Court of Appeals *(sub nom Matter of the City of New York (Brookfield Refrigeration Corp.,* 58 N.Y.2d 532, 469 N.Y.S.2d 616 (1983)).

Upon conclusion of the appeals as to appellant's award, the appellee offered to pay the award, with six percent statutory interest, which appellant collected, under protest. It then instituted the within suit, pursuant to Section B15-28(b) of the *Administrative Code* of the City of New York, for payment of an additional three percent interest per annum

on the award from January 1, 1978, alleging that payment of the statutory 6% rate was a denial of just compensation and that the appellant, City, was collaterally estopped to deny that the proper rate of interest was 9%. Appellee alleged that the attempt to secure more than the statutory rate of interest, pursuant to *General Municipal Law*, Sec. 3-a (2) was a collateral attack on the Final Decree of the Court in the condemnation proceeding in that no appeal had been taken from that decree and that no more than the statutory rate could be paid. Appellant disagreed in that as no issue had been raised in the condemnation proceeding as to the proper rate of interest and as the Final Decree was silent as to any rate of interest, said decree could not be deemed final on the question of the rate of interest.

It was later argued, in both the Appellate Division and the Court of Appeals, both by appellant and by amici curiae, that, in any event, appellant, during the trial of the just compensation issue, could not be put to the burden of speculating on how long after the trial it would take to pay the award of just compensation and what the fair rate of interest would be during that future period. It argued that at the time of the trial the 6% statutory rate was a fair rate of interest and it had so been judicially determined by the Court of Appeals in *Eveandra Enterprises Inc. v. Nassau County*, 42 N.Y.2d 846 and later in *Matter of City of N.Y., (Brookfield Refrigeration Corp.)*, supra, and thus no issue, in fairness, could be expected to be raised. It did point out to the Courts the gross disparity between the rates of interest it had to pay on its loans and the 6% statutory interest rate during the period at issue.

The Supreme Court, New York County, after denying appellee's motion for summary judgment, granted appellant's motion for summary judgment, which the Appellate Division modified by disallowing attorneys fees, but other-

wise affirmed, 102 A.D.2d 769, 477 N.Y.S.2d 19 and granted the appellee leave to appeal to the Court of Appeals – A.D.2d, – N.Y.S.2d –.

The New York State Court of Appeals, by decision here appealed from, filed May 16, 1985, 65 N.Y.2d 83, 489 N.Y.S.2d 896 reversed the Courts below and dismissed appellant's complaint, holding that there was no constitutional protection to post decree (or judgment) interest, that the guarantee of just compensation was satisfied if there were a fair rate of interest up until the Final Decree (or judgment) and that as interest after that date was incidental or penalty interest it was solely a creature of statute, given by grace of the legislature, not constitutionally guaranteed, and thus was not subject to attack as a denial of just compensation. This being so, the Court held that the question of prejudgment interest had to be raised during the proceedings leading to that decree, and if it were not, to raise it later was a collateral attack on the Final Decree and was barred by principles of res judicata. It is to be noted that the position that just compensation interest need only be paid until the Final Decree was raised by the Court itself, sua sponte, not being contended for by appellee and appellant's position being based upon the Court's statement in *Matter of City of New York (Brookfield Refrigeration Corp)*, supra, that just compensation interest was payable until payment of the condemnation award.

Thus, the last two issues formulated here were never reached in the briefs to the Courts below and arise solely by reason of the Court of Appeals sua sponte holding. Since the Court of Appeals had previously held that the modification of a decree on appeal results in a new decree under New York law *(In re Chrystie Street in City of New York*, 264 N.Y. 319 (1934)) and, appeals in New York are based solely upon a record, not a new trial, and proof as to current interest

rates can not be proved on appeal *(Tandoi v. State of New York*, 87 A.D.2d 816,448 N.Y.S.2d 768 (1982)*)*, unexplained by the Court is how any condemnee could elicit proof as to current interest rates during the appeal period which leads to a modified decree, and why lack of such an opportunity would not only lead to a denial of just compensation, but why it is not a denial of due process of law.

REASONS FOR REQUIRING PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT

I

In the decision appealed from, the New York State Court of Appeals divided the period during which the condemnation award remained unpaid into two parts with respect to interest payment, to wit: prejudgment interest and postjudgment interest. The Court stated that there was a material difference between prejudgment and postjudgment interest based upon its previous holding in *Matter of Rochester Carting Co. v. Levitt*, 36 N.Y.2d 226. It held that only prejudgment interest is constitutionally required as a substitute for the beneficial use of the property, but not so for the postjudgment period. It also held that during the postjudgment period interest is paid as a penalty for delay in payment and that the rate of interest to be paid during the postjudgment period may be fixed by statute (or for that matter totally denied), without just compensation considerations, in that case *General Municipal Law* Sec. 3-a(2) which provides:

> "The rate of interest to be paid upon any judgment or accrued claim against the Municipal Corporation arising out of the condemnation proceeding or actions to recover damage for wrongful death shall not exceed six

percent per annum."

That Court however did not explain its departure from its prior decision in *Matter of the City of New York (Brookfield Refrigeration Corp.)*, 58 N.Y.2d 532 requiring the payment of just compensation interest from taking through to payment, and affirming the fixing of that rate of interest at 9% per annum starting with January 1, 1978, specifically to the date of payment.

It has been consistently held by this Court that interest on a condemnation award is the equivalent of the beneficial use of the property, for which just compensation is required by the Fifth Amendment from the date of the taking to the date of the payment of the award. *(Phelps v. United States*, 274 U.S. 341, 344; *Seaboard Airlines Railway Company et.al. v. United States*, 261 U.S. 299, 304; *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588; *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123). In no case of which we are aware has this Court fixed an earlier date than actual payment of the award.

The holding by the New York State Court of Appeals that interest is not constitutionally required for the three year period from the Final Decree to the date of payment, is tantamount to either saying that during that period the condemnor did not have the beneficial use of the condemnor's property or that securing a decree or judgment is tantamount to payment, both of which, on their surface, are untenable. The New York State Court of Appeals in limiting the findings in *Brookfield*, supra, as to what is a constitutional rate of interest as applicable only to the predecree period is at variance both with its earlier holding and the statements of this Court on this subject.

The Court, in limiting the challenge as to the interest rate to the predecree period, did not have to deal with the

issue of requiring appellant to speculate on how long the postdecree period to payment would be and the fair rate of interest during that time, which would involve the sheerest speculation. *Brown v. United States*, 263 U.S. 78,87. It also did not deal with an issue, inherent in its decision, of how any condemnee could challenge the statutory rate of interest for the period after the Final Decree of the trial Court, where that decree is later modified, thus creating a new decree since in the appeal process there is no opportunity to submit evidence not part of the record.

As pointed out in *Seaboard Air Lines*, supra, at page 306 that "It is obvious that the owners right to compensation cannot be made to depend upon state statutory provisions". It is the Fifth Amendment that safeguards the owner's right to just compensation. *General Municipal Law*, Sec. 3-a,(2) in fixing the rate of interest, which is a judicial question, is repugnant to the just compensation provision of the Fifth Amendment and decisions of the United States Supreme Court, under the circumstances presented here.

This is not an isolated case. There are pending in the Courts of the State of New York cases involving the same issues as in this case, which affect the rights of owners of property acquired in condemnation proceeding, and which rights are dependent on the results of this appeal*. There are potentially many others.

The issues involved here are certain to rise again and

Glantz & Vernon d/b/a H.G.V. Associates (a partnership) et. al. v. City of New York (New York County Clerk's Index No. 22741/83); Franklin Records Center Inc. v. City of New York (New York County Clerk's Index No. 6972/84); Jomar Real Estate Corp. v. City of New York (New York County Clerk's Index No. 14862/84); Balfour Concessions, Ltd. et. al. v. City of New York (New York County Clerk's Index No. 10024/84); Tully & Dinapoli v. City of New York (Kings County Clerk's Index No. 6294/84).

again, particularly where there are any appeals taken from condemnation awards. In fact, if the decision appealed from here is not set aside, and is adopted in other states, not unlikely in view of the prestige of the New York Court of Appeals, there is nothing to stop state legislatures from denying any interest on condemnation awards during the pendency of appeals from final judgments and condemnors taking appeals just to secure the benefit of a delay in payment with no payment or very low payment of interest.

II

But that is only the tip of the problem. One would believe that where this Court has spoken so definitively on this subject that the instant case would be deemed but an aberration. As was said in *United States v. Thayer-West Point Co.*, 329 U.S. 585, 588 (1947);

> "This rule is unapplicable, however, where the United States takes property under its power of eminent domain; in such cases it has consistently been held that the Fifth Amendment's reference to 'just compensation' entitles the property owners to receive interest from the date of the taking to the date of payment as a part of his just compensation, Seaboard Air Line Ry. v. United States, 261 U.S./299, 306; Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123; Phelps v. United States, 274 U.S. 341, 344"

The Court of Appeals of the State of New York only recently has stated similarly in *Matter of City of New York (Brookfield Refrigeration Corp)*, 58/N.Y.2d 532, 536 (1983);

> "It is well established that in condemnation proceedings the constitutional requirement of just compensation necessarily includes a sum in addition to the base

value of the property to account for the delay between the taking and the ultimate payment to the property owner (Jacobs v. United States, 290 U.S. 13; City of Buffalo v. Clement Co., 28 N.Y. 2d 241, 265-266; Matter of City of New York (Bronx Riv. Parkway), 284 N.Y. 48, 54-55, aff'd sub. nom. A.F. + G Realty Corp. v. City of New York, 313 U.S. 540: see U.S. Const., 5th Amdt; N.Y. Const., Art. I, Sec 7)."

Yet, in the face of this, how does one explain not only the instant appealed from decision but also *Matter of Rochester Carting Co. v. Levitt,* 36 N.Y.2d 226 which preceded *Brookfield Refrigeration Corp,* supra. The only rational explanation that we can conceive of, other than an otherwise inexplicable inconsistent decision, is that the New York Court of Appeals is not taking the language in the decisions of this Court literally in that it equates the rendering of a judgment, even though later modified on appeal, with payment.

While this sounds unlikely, it becomes less so when one finds that the New York Court of Appeals is not alone in not giving full credence to specific words of this Court's decisions. *Rochester Carting Co.,* supra, makes references as indicating those jurisdictions where varying interpretations are given to this Court's mandate to pay just compensation interest to the date of payment. Thus we find in checking some of its citations as well as in 29A C.J.S., Sec. 176(2) (b) at page 780 that Courts have permitted to condemnees interest only to the date of trial[1], to the date of the verdict or award [2], to the date of deposit in Court[3] and to the date of final judgment [4], all of which appear to be inconsistent with the decisions of this Court requiring just compensation interest to the date of payment. It would appear that this Court would wish to clarify its view as to the constitutional requirement as to the payment of just compensation interest

so that there will not be a pot pourri of decisions as to this important right in the varying jurisdictions in the United States, many of which depart from the plain meaning of this Court's decisions.

Respectfully submitted,

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1. *Alabama:* Southern Ry. Co. v. Clark, 220 Ala. 555, 126 So.855.

2. *Indiana:* State v. Coridan, 222 Ind. 545, 54 N.E.2d 649.

Maine: Williams v. State Highway Commission, 157 Me. 324; 172 A.2 625.

New Jersey: Duncan Hood Corporation v. City of Summit, 105 N.J. Law 583, 146 A. 182,184;

Pennsylvania: In re Appropriation and Taking of Lands of Moffat, Lackawanna County, 400 Pa. 123,161 Ala. 2d 352;

Virginia: May v. Dewey, 201 Va. 621,112 S.E.2d 838,848.

3. *California:* Sacramento and San Joaquin Drainage District v. Truslow, 125 Ca.2d 478, 271 Pa.2d 930.

4. *Connecticut:* Salgreen Realty Co. v. Ives, 177 A.2d 673, 149 Conn. 208; Clark v. Cox, 134 Conn. 226, 56 A.2d 516;

Pennsylvania: Metropolitan Water District of Southern California v. Adams, 107 Pa.2d 618, 16 Ca.2d 676; People et. al. v. Loop., 326 P.2d 902,905,161 Ca.2d 466; Treser v. General State Authority, 154 A.2d 325, 190 Pa. Super 490;

California: Los Angeles County Flood Control District v. Hansen, 48 Ca.2d 314, 119 P.2d 734;

Missouri: St. Louis Housing Auth. v. Magafas, 324 S.W.2d 697,700.

APPENDIX

(i) Copy of the opinion of the New York State Court of Appeals, delivered upon the rendering of the judgment appealed from.

(ii) (a) Copy of the opinion of the Appellate Division, First Department of the New York State Supreme Court, modifying in part and affirming the order of the New York State Supreme Court, Special Term, Part I, New York County.

(ii) (b) Copy of the order of the Appellate Division, First Department of the New York State Supreme Court granting leave to appeal to the Court of Appeals of the State of New York.

(ii) (c) Copy of the opinion (Meyers, J.) Supreme Court, State of New York, Special Term, Part I, New York County, granting Plaintiff's motion for summary judgment.

(iii) Copy of judgment of the Court of Appeals, State of New York No. 171, appealed from, entered May 16, 1985

(iv) Copy of the Notice of Appeal filed with the Clerk of the Court of Appeals of the State of New York, by mail on August 6, 1985 filed with the County Clerk, New York County, State of New York by mail on August 6, 1985, and personally served on the Appellee, the City of New York, on August 6, 1985.

(i) Copy of the opinion of the New York State Court of Appeals, delivered upon the rendering of the judgment appealed from

STATE OF NEW YORK
COURT OF APPEALS

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1 NO. 171

ADVENTURERS WHITESTONE CORPORATION
Respondent,
vs.
THE CITY OF NEW YORK,
Appellant.

ADVENTURERS WHITESTONE CORPORATION

(171) Frederick A. O. Schwarz, NYC Corporation Counsel (Peter A. Mound, Joseph I. Lauer, & Robert Pfeffer of counsel) for appellant.

Herman Itskowitz & Alfred D. Jahr, NY City, for respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

MEYER, J.

Interest on a condemnation judgement is paid to compensate for delay in payment of the award and is payable at

such rate as is fixed by statute. Interest on the value of the property taken is required by the just compensation clauses of the Federal and State Constitutions as a substitute for the beneficial use of the property during the period between the date of the taking and the date of the final judgement. It is nevertheless, payable at the rate fixed by statute unless it is established in the condemnation proceeding that as compared to the prevailing market rate the statutory rate is unreasonable. Plaintiff, having failed to contest the statutory rate in the condemnation proceeding, was entitled only to interest at the statutory rate both pre- and postjudgment, which concededly it has received. The order of the Appellate Division should, therefore, be reversed, with costs, and the complaint dismissed.

I

Plaintiff's property was taken by the City as part of a capital project on April 4, 1974. During hearings held by Supreme Court, Queens County, in May, September and December 1976, no issue was raised concerning the rate of interest to be paid. Tentative decrees dated September 14, 1978 and November 28, 1978, fixed the value of the property taken, but made no mention of interest. On December 13, 1978, the Corporation Counsel was directed to submit a final decree, but no decree was submitted until July 18, 1979. Both parties appealed and on June 8, 1981, the Appellate Division increased the fixture award but otherwise affirmed (82 AD2d 829). On appeal to us, the Appellate Division's order was affirmed on April 1, 1982 (55 NY2d 345).

On July 12, 1982, the City Comptroller offered payment of the principal sum thus fixed, plus 6% interest.[1] Plaintiff responded by letter on July 19, 1982, demanding 9% interest, that rate having been fixed by Supreme Court, Bronx

County, in a decision dated August 7, 1981 in *Matter of South Bronx Neighborhood Development Plan* (110 Misc 2d 571), as the fair rate required as of January 1, 1978 to constitute just compensation.

The Bronx decree was affirmed by the Appellate Division on September 28, 1982 (89 AD2d 948) and by us *(sub nom Matter of City of New York [Brookfield Refrigeration Corp.]*, 58 NY2d 532) on May 3, 1983.

On July 21, 1982, plaintiff accepted the City's vouchers, reserving the right to additional interest as demanded in its previous letter, and on August 12, 1982 filed its notice of claim. Payment having been refused by the City, plaintiff then began this action in Supreme Court, New York County, to recover the difference between 6% and 9% interest from January 1, 1978. The City moved to dismiss the action as barred by *res judicata*, plaintif having failed to raise the constitutionality of the interest rate in the Queens County proceeding. Plaintiff cross-moved for summary judgment, arguing that Administrative Code, section B15-28.0(b) authorized its separate action, that the Queens decree made no mention of the interest and that the City was not collaterally estopped but also required as a matter of *stare decisis* to pay 9% interest from January 1, 1978 as fixed by the Bronx decree. Supreme Court, New York County, denied the City's motion and granted plaintiff's cross-motion, awarding plaintiff the interest demanded plus attorney's fees. The Appellate Division modified on the law by vacating the award of attorney's fees but otherwise affirmed (102 AD2d 769), and

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1. At all times relevant to this action General Municipal Law, section 3-a(2) has provided that, "The rate of interest to be paid upon any judgement or accrued claim against the municipal corporation arising out of a condemnation proceedings or action to recover damages for wrongful death shall not exceed six percent per annum."

granted the City's motion for leave to appeal (CPLR 5601[a][1][i]).

We conclude (1) that the Constitution requires interest at the prevailing rate only for the period between taking and award and only upon a demonstration that the statutory rate is unreasonably low, (2) that the Administrative Code does not foreclose litigation of the reasonableness issue as part of the condemnation proceeding and (3) that a claimant who fails to litigate the issue in the condemnation proceeding may not maintain an independent action to recover additional itnerest.

II

There is a material distinction between prejudgment interest and postjudgment interest. *Matter of Rochester Carting Co. v Levitt* (36 NY2d 264) held that, "Interest accruing prior to the award is payable as a substitute for the beneficial use of real property, and its payment is constitutionally required. Postjudgment interest, by way of penalty or incidental interest, is not constitutionally required, and statutes regulating such interest have as a rule not been deemed to run afoul of the 'full compensation' requirement", (36 NY2d at 268; accord: *Matter of Riccardi v Abrams,* 85 AD2d 65, app dsmd and lv dsmd 56 NY2d 1033). Thus, postjudgment interest will be increased or decreased from the effective date of a statute changing the applicable rate *(Matter of Board of Education [Sapsen],* 35 AD2d 973 [increase]; *Matter of Incorporated Vil. of Hempstead [YMCA of Nassau & Suffolk Counties],* 33 AD2d 1036 [increase]; see *Matter of City of New York [Bronx River Parkway],* 284 NY 48, remittitur ammended 284 NY 701, affd summarily *sub nom AF&G Realty Corp. v City of New York,* 313 US 540 [decrease]; *People ex rel. Emigrant Industrial Sav. Bank v Sex-*

ton, 284 NY 57 [decrease]).

As to prejudgement interest, however, just compensation, under both the Fifth Amendment to the Federal Constitution[2] and article 1, section 7, clause a of the State Constitution,[3] requires not only payment of the value of the property at the time of the taking but also interest on that sum to account for the delay between the taking and the judgment *(Matter of City of New York [Brookfield Refrigeration corp.]*, 58 NY2d 532, 536; *City of Buffalo v Clement Co.*, 28 NY2d 241, 265-266; *Matter of City of New York [Bronx River Parkway]*, 284 NY 28, 54, *supra*). The amount of interest necessary to bring the payment into accord with the constitutional requirement is a judicial question, although the interest rate fixed by the Legislature will be deemed presumptively reasonable unless the claimant rebuts the presumption with evidence of prevailing market rates establishing that the statutory rate is so "unreasonably low" as not to constitute just compensation *(Matter of City of New York [Brookfield Refrieration Corp.]*, *supra*, at 537 and cases cited). But the statutory rate being presumptively reasonable, a claimant who claims to be constitutionally entitled to a higher rate of interest bears the burden of proving the constitutional insufficiency of the statutory rate (see *Heyert v Orange & Rockland Utilities*, 17 NY2d 352, 364).[4]

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2. "[N]or shall private property be taken for public use, without just compensation."

3. "Private property shall not be taken for public use without just compensation."

4. *Kirby Forest Industries v Unitd States* (__US__, __, 104 S Ct 2187, 2198) declined to order the payment of interest on a condemnation award under federal statute but recognized that when there is substantial delay between

III

Plaintiff argues that interest did not become an issue until the Comptroller failed to apply the 9% rate mandated by the *Brookfield Refrigeration* case to the warrant for its award, that under the New York City Administrative Code it could not have litigated the interest issue in the condemnation proceeding, and that it would be illogical to require it to do so when it could not be known at the time of the trial of the condemnation issues when the award would finally be paid.

The last contention need not long detain us for constitutional interest is, as above noted, payable only for the period from taking to judgment,[5] which in most circumstances will follow soon after conclusion of the trial.

Plaintiff's argument based on the Administrative Code

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the date of valuation and the date the judgment is paid, during which time the value of the land changes materially, a new hearing on value may be required. The principle of that case is inapplicable to the present action, which is separate and apart from the condemnation proceeding and which is predicated on a change in interest rate rather than a change in value.

5. Because the statutory rate has remained at 6% during all times relevent to this action and plaintiff has not shown itself to be entitled to more than the statutory rate for the constitutional interest period, we need not determine the exact date of judgment in this case. To be noted, however, is that the condemnation award will normally constitute the judgment (cf. Uniform Eminent Domain Code, §1203, 13 ULA 134) unless the condemning authority appeals unsuccesfully, in which event the judgment finally entered will be determinative (cf. *Matter of City of New York [Chrystie St.]*, 264 NY 319). When the constitutional interest issue has been raised before the condemnation court and during the time necessary to dispose of the appeal the interest rate undergoes a substantial upward change, it may, therefore, be necessary to accord the claimant a further hearing at which that fact can be established (cf. *Kirby Forest Industries v United States*, *supra* n 4).

stems from section B15-28.0(b), which provides that, "In a capital project proceeding, payment shall be made within two calendar months after the entry of the final decree. In default of such payment, the owners or other persons entitled to be paid in the proceeding may at any time after application made to the comptroller therefor, sue and recover the amount due, with lawful interest, and the cost of such suit." This, it is contended, clearly contemplates a second, plenary suit in which interest is to be litigated. The difficulty with the argument is that it fails to distinguish between prejudgment constitutional interest, which is part of the award, and postjudgment statutory interest, which is not. The reason for providing for suit on the final decree rather than execution upon the condemnation award is unclear,[6] but the Administrative Code does not proscribe the raising of the constitutional interest rate issue in the condemnation proceeding. That interest is not provided for in the condemnation award and is first added in the Comptroller's warrant is not surprising in light of the presumption that the statutory rate is constitutional and the Comptroller's obligation to proceed according to the statute unless after litigation of the constitutional interest question the court has held othewise as to the period during which the rate applies. It follows that, as we said in *Matter of City of New York (Jefferson Houses-Lombardi)* (306 NY 278, 282): "Far better is it — and, as we vie the laws, consistent with the intent of the Legislature as expressed in the words of the statutes — to permit *one* court, having the parties *then* present before it and ready * * * to submit their controversy to that court, to settle all questions * * *" (emphasis in original). Indeed, the interest issue has been litigated before the condemnation court in a number of cases *(Matter of City of New York [Brookfield Refrigeration Corp.]*, 58 NY2d 532, *supra; Matter of City of New York [Roteeco Corp.]*, 33 NY2d 970; *Matter of City of New York [Manhattan Civic Center]*, 27 NY2d 518, affg 32 AD2d 530,

affg 57 Misc 2d 156).[7] There was, therefore, no bar to plaintiff's raising the issue in the Queens proceeding.

IV

Under usual principles of claim preclusion, plaintiff is barred from raising in second action an issue which it could have raised in the condemnation proceeding (*Matter of City of New York [Roteeco Corp.], supra; Matter of Huie [Furman]*, 20 NY2d 568; *Matter of City of New York [Brooklyn-Queens Hwy.]*, 300 NY 265; *Tandoi v State of New York*, 87 AD2d 816; *Matter of City of New York [Squitieri]*, 39 AD2d 669; Restatement, Judgements, 2d, §18).

Plaintiff argues that the *Roteeco* decision is distinguishable, but examination of the record in that case shows that there were two separate decrees, the first of which fixed the value of the fee parcels and made no mention of interest and the second of which valued the fixtures and limited interest to 4%. Claimant's counsel made the same argument here advanced, that the final decree need not speak to interest be-

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6. Compare Court of Claims Act, §§ 19, 20, and Eminent Domain Procedure Law, §§ 513, 514, both of which contemplate only a judgment, not a decree followed by suit on the decree.

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7. *Matter of City of New York [Hutchinson River Parkway Extension]* (262 App Div 487) held a motion in the condemnation proceeding to direct payment of the award an improper way to raise issues concerning whether a transfer of tax lien was void and whether the interest rate of 12% on the lien continued after condemnation "did not involve the correction of any part of the condemnation decree" and that petitioner's "proper remedy, therefore, was to proceed by plenary action" (262 App Div at 488) in view of the language of section B15-28.0(b). It was not concerned with whether the issues could have been raised earlier, nor apparently was any such argument made.

cause it was constitutionally required as a matter of just compensation and, "The addition of interest to awards requires the performance of a purely ministerial act, an arithmetic computation, purely a pro-forma function." He argued also that the decision in *Manhattan Civic Center, supra*, mandated that the City pay interest at 6% rather than 4% after August 1, 1966 on all awards in condemnation. Our decision was (33 NY2d at 971-972) that both the fee and the fixture claimants were foreclosed from obtaining additional interest, the fixture claimant because he was denied interest greater than 4% and took no appeal, the fee claimant because it had not reserved the interest issue and took no appeal, with the result that both decrees "became final and the trial court had no jurisdiction to alter its decree in any matter of substance" (*id.*, 972).

The only differences between *Roteeco* and the instant case are that the *Roteeco* application for additional interest was by motion in the condemnation proceeding and that the fee claimant in *Roteeco* did not reserve the interest issue while the present claimant sought by its letter to the Comptroller to preserve the issue and brought an independent action. Neither helps the present plaintiff, however. Actions separate from a condemnation proceeding to recover interest have been allowed, but none involved the *res judicata* question presented by this case. In *Grote v City of New York* (190 NY 235), the court allowed such an action because of "an express agreement between the parties that the question as to the right to recover interest should be reserved and determined by an action to be brought by plaintiff" (*id.*, 237). *Vanneck Realty Corporation v City of New York* (296 NY 1040) concerned not the rate of interest payable, but whether the City could withhold interest in a capital project proceeding under the provision of then section B15-28.0(b) of the administrative Code (later deleted by Laws of 1963, ch

100, §258), applicable to assessable improvement proceedings, which provided that interest stopped running six months after final decree unless claimant demanded payment within that time. Clearly an issue which could not arise until six months after final decree could not be barred by the final decree. Also distinguishable are *Matter of Crane v Craig* (230 NY 452) and *Matter of Murphy v Prendergast* (99 Misc 326, affd 179 App Div 904, app denied [as recorded in the *Craig* decision, 230 NY at 462]), even though there is language in those opinions differentiating interest which is part of the compensation allowed, for all that those cases hold is that acceptance of less than interest for the full period the statute required interest to be paid did not waive the right to sue for the interest withheld. Neither case concerned the rate of interest, nor was any issue of *res judicata* presented in either.

Here plaintiff neither raised the question of the rate of interest constitutionally required in the condemnation proceeding nor preserved by stipulation its right to litigate the issue in another forum. Its claim to the higher rate of interest is, therefore, barred by *res judicata*.

For the foregoing reasons, the order of the Appellate Division should be reversed, with costs, and the complaint dismissed.

Order reversed, with costs, and complaint dismissed. Opinion by Judge Meyer. Chief Judge Wachtler and Judges Jasen, Simons, Kaye and Alexander concur.

Decided May 16, 1985

(ii) (a) Copy of the opinion of the Appellate Division, First Department of the New York State Supreme Court, modifying in part and affirming the order of the New York State Supreme Court, Special Term, Part I, New York County.

Sullivan, J.P., Carro, Asch, Milonas, JJ.

19885-86

ADVENTURERS WHITESTONE CORPORATION,
Plaintiff-Respondent,

H. Itskowitz

-against-

THE CITY OF NEW YORK
Defendant-Appellant.

P.A. Mound

Order of the Supreme Court, New York County (Allen Murray Myers, J.), entered on November 10, 1983 and judgment, based thereon, entered on November 15, 1983, which denied the motion by defendant City of New York for summary judgement dismissing the complaint and granted plaintiff's motion for summary judgement in the amount of $84,381, representing additional interest on a condemnation award together with counsel fees, is modified on the law, the facts, and the exercise of discretion to the extent of vacating the award of counsel fees in the sum of $10,000, and otherwise affirmed, without costs or disbursements.

Although the court is authorized to award counsel fees "to any party to a dificult or extraordinary case", the statutory amount permissible is limited to a sum not exceeding three thousand dollars. (CPLR 8303 (a) (2)) Howver, in the instant situation, Special Term allowed an award of counsel fees in the amount of $10,00. Moreover, since the record herein fails to demonstrate that the action was of such a dificult or extraordinary nature as to warrant an award of counsel fees, there appears to be no basis to depart from the general rule that such fees constitute a non-recoverable item. *(City of Buffalo v. Clement Co.*, 28 NY2d 241; *Tucker v. Toia*, 64 AD2d 826)

All concur.

(ii) (b) Copy of the order of the Appellate Division, First Department of the New York State Supreme Court, granting leave to appeal to the Court of Appeals of the State of New York.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September, 1984.

Present – Hon. JOSEPH P. SULLIVAN *(Justice Presiding)*
JOHN CARRO
SIDNEY H. ASCH
E. LEO MILONAS (Justices)

M-3996
(19885-86)

ADVENTURERS WHITESTONE CORPORATION
Plaintiff-Respondent,
-against-
THE CITY OF NEW YORK,
Defendant-Appellant.

The above-named defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this court entered on June 26, 1984,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is

granted , and this Court, pursuant to CPLR 5713, states that questions of law have arisen which ought to be reviewed by the Court of Appeals.

ENTER:

Joseph J. Tucchi
Clerk

(ii) (c) Copy of the opinion (Meyers, J.) Supreme Court, State of New York, Special Term, Part I, New York County, granting Plaintif's motion for summar judgment.

MEMORANDUM DECISION OF MYERS, J.,
DATED SEPTEMBER 16, 1983

(pp. 53-59)

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM : PART I

ADVENTURERS WHITESTONE CORPORATION
Plaintiff,
-against-
THE CITY OF NEW YORK,
Defendant

Index No. 42660/83
#53 of 8/19/83

ALLEN MURRAY MYERS, J.:

This is an action by an owner of property (leashold and fixtures) whose property was taken by the defendant, The City of New York ("City"), in a condemnation proceeding in Queens County for the College Point Industrial Park Urban Renewal Project II Stage II (Supreme Court, Queens County Index No. 3088/74). Title vested in the City on April 4, 1974.

A trial was held before Justice Leo Brown in Supreme Court, Queens County during the period 1976-1978. A final decree was entered on July 13, 1979, Appeals and cross-appeals therefrom were taken by plaintif and the City. The Appellate Division affirmed a $334,000 Leasehold award, but modified a fixture award by increasing it from $195,730 to $239,850. [82 AD2d 829 (2nd Dept., 1981)]. The Court of Appeals affirmed, [55 NY2d 345 (1982)].

The question of the amount of interest to be paid on the award was never raised nor litigated in the trial or appellate courts. Neither did the final decree entered on July 18, 1979 provide for or ever mention the word, "interest."

On July 21, 1982, the City offered the amount of the award plus six percent (6%) interest. The plaintiff contended that it was entitled to six percent from April 4, 1974, the vesting date, to December 31, 1977; and that it was entitled to the rate of nine percent (9%) for the period commencing January 1, 1978 to the date of payment on or about July 21, 1982. Plaintiff took the proferred payment under protest and with proper reservation of its rights to the difference in the amount of interest and brought this action for the deficiency in the interest payment, $66,456.00, plus attorney's fees.

THE CITY'S ARGUMENT

The City argues that the rate of interest was fixed by statute, i.e. section 3-a(2), General Municipal Law, which provides that,

> "The rate of interest to be paid upon any judgment or accrued claim against the municipal corporation arising out of condemnation proceedings...shall not exceed six per centum per annum."

THE PLAINTIFF'S ARGUMENT

The plaintiff invokes the decision of the Court of Appeals in City of New York (Brookfield), 58 NY2d 532 (1983) wherein the court held at page 536,

> "It is well established that in condemnation proceedings the constitutional requirement of just compensation necessarily includes a sum in addition to the bare value of the property to account for the delay between the taking and the ultimate payment to the property owner (Jacobs v. United States, 290 US13; City of Buffalo v. Clement Co., 28 NY2d 241, 265-266; Matter of City of New York [Bronx River Parkway], 284 NY 48, 54-55 affd sub nom."
>
> "A.F.&G. Realty Corp. v. City of New York, 313 US540; see US Const, 5th Amdt; NY Const, art I, §7). The property owner is entitled to receive a fair return for the deprivation of the use of the property or the money equivalent of that use (see Matter of County of Nassau [Eveandra Enterprises], 42 NY2d 849, 850, app

dsmd 434 US 804; Matter of City of New York [Lincoln Sq. Slum Clearance Project], 15 AD2d 153, 178-182, affd 16 NY2d 497). Moreover, because the ascertainment of just compensation is a judicial question, the amount of interest to be paid as an additional component of such compensation is also a matter for judicial determination (Jacobs v. United States, 290 US 13, supra; City of Buffalo v. Clement Co., 28 NY2d 241, supra). The Legislature may fix a fair or prima facie measure of the proper interest rate in the first instance, and it has done so in section 3-a of the General Municipal Law,[1] but while the legislatively fixed rate is presumptively reasonable, it is not determinative of the issue. The claimant may introduce relevent evidence of previaling market rates to rebut the statutory presumption of reasonableness and demonstrate that some higher rate must be paid to afford him just compensation."

The Court of Appeals in that case affirmed the findings of Special Term, "that the 6% statutory rate of interest was inadequate to afford just compensation during the years 1978-81" and affirmed the trial court's decision that just compensation required the payment of interest at the rate of 9% from January 1, 1978 to the date of payment.

The plaintiff also cites the case of Matter of County of Nassau (Milburn Creek) __Misc2d__, NYLJ, August 5, 1983, p. 17 cols. 4, 5 and 6, Supreme Court, Nassau County, wherein lies Justice Mead held for the period from 1978 through 1982 interest at the rate of eleven (11%) percent per annum was required "to provide just compensation to claimants."

COLLATERAL ESTOPPEL

The plaintiff contends that under the principle expounded in Schwartz v. Public Administrator of County of Bronx, 24 NY2d 65, 71, the City is equitably or collaterally estopped from relitigating the issue-as to the lawfully adequate rate of interest on condemnation awards after January 1, 1978. The plaintiff is content with the rate of 9% upheld by the Court of Appeals.

It cannot be denied that this issue was assiduously contested by the City, in City of N.Y. (Brookfield), in the trial court (110 Misc2d 571), in the Appellate Division (89 AD2d 948), and in the Court of Appeals (58 NY2d 532). It cannot be denied that the issue there contested is the identical issue before this court and that the City had a full and fair opportunity to be heard. It therefore seems to me that this issue ought not to be relitigated. I find that the City is estopped from doing so.

Both sides have moved for summary judgment. In support of the City's motion it is argued that the final decree entered in the Supreme Court, Queens County condemnation proceeding (Index No. 3088/1974) on July 18, 1979, as modified and affirmed by the Appellate Division (82 AD2d 829) and as affirmed by the Court of Appeals (55 NY2d 345) is *res judicata* on the issue now before this court, i.e., the proper rate of interest to be paid on the condemnation award after January 1, 1978 to the date of payment on or about July 21, 1982. It is not disputed that this issue was not litigated in the trial court and that the final decree does not provide for the payment of any interest. The key provision in the decree reads,

"(amounts) are the just compensation which the respective owners of said damage parcels are entitled to receive from the City of New York for the taking of the property...which amounts have been ascertained and determined as of April 4, 1974, the date of vesting of title in the City of New York."

The City contends that regardless of the fact that the Court of Appeals has decided that subdivision 2 of section 3-a of the General Municipal Law, which provides for the payment of 6% interest on a condemnation award, has been found to be legally insufficient to satisfy the applicable constitutional requirement of "just compensation" for the period from January 1, 1978 to the date of payment in 1982, and that a rate of 9% was found to be necessary to satisfy such requirement; the city may ignore that decision and continue to pay interest at the rate of 6% on condemnation awards for that period.

I disagree. Once the statutory presumption of reasonableness has been overcome and it has been established that a higher rate (9%) must be paid on an award to condemnee to afford him just compensation, as was done in City of New York (Brookfield), *supra*, the City must henceforth pay the interest fixed by the court for that period. It is generally recognized that where governmental operations are involved, subsequent petitioners will be "adequately protected under principles of 'stare decisis'." Jones v. Berman, 37 NY2d 42, 57 (1975). The plaintiff did not waive his constitutional right to receive lawfully adequate interest by not appealing from the final decree because the decree was silent on the question of the rate of interest to be paid. The plaintiff could assume that a governmental agency would be bound by "stare decisis." When the City refused to pay the required 9%, and proferred only the 6%, found by the court to be constitution-

ally deficient, the plaintif had the right to bring this plenary suit for the $66,456.00 deficiency.

I disagree with the City's contention that this is an action to modify the final decree or that it is a collateral attack on the final decree. A judgment for the plaintiff for the deficiency in the interest proferred by the City would in no way contradict, modify or interfere with the final decree.

The condemnation statute authorized plaintiff's suit.

"Damages, when, how and to whom paid.

a. All damages awarded by the court with interest thereon from the date of the filing of the final decree, or if title to the real property acquired by the city shall have vested prior thereto, from the date of such vesting... shall be paid by the city to the respective owners mentioned or referred to in the final decree... as hereinafter provided.

b. In a capital project proceeding, payment shall be made within two calendar months after the entry of the final decree. In default of such payment, the owners or other persons entitled to be paid in the proceeding may at any time after application first made to the comptroller therefor, sue for and rec over the amount due, with lawful interest, and the costs of such suit..." (Administrative code, section B15-28.0)

Plaintiff's condemnation award was in a capital project proceeding and plaintiff has fully complied with all of the above requirements.

Plenary suits for additional interest on condemnation awards have been allowed in courts other than the condemnation court. See, Vanneck Realty Corporation v. City of New York, 296 N.Y. 1040 (1947); Delaware, Lackawanna and Western Coal Company v. City of New York, 296 N.Y.

1 2 (1947); Matter of Crain v. Craig, 230 N.Y. 452, 461. The cases cited by the city are inapposite and not to the contrary. Matter of City of New York (Roteeco Corp.), 33 NY2d 976 (1974) sought to amend a final decree. In the case at bar, the plaintiff adopts the decree as final and is not seeking to modify or amend it. Plaintiff is merely seeking the payment of its awards with the lawful interest. Since the question of what is lawful interest was not litigated in the condemnation court, the doctrine of *res judicata* does not apply. See Schuylkill Fuel Corp. v. B. &. C. Nieberg Realty Corp., 250 N.Y. 304, 307.

The City's motion to dismiss the complaint is, therefore, denied.

The plaintiff's motion for summary judgement is granted. What is lawful interest on a condemnation award for the period in question has already been decided by the Court of Appeals. It cannot vary from condemnee to condemnee. It obviously must be the same for all claimants. The City is collaterally estopped from relitigating this issue. There are no other issues of fact. The plaintiff does not seek more than the 9% found to be just compensation by the Court of Appeals, although plaintiff has submitted proof that the interest rates which the plaintif has paid on loans during the period in question greatly exceeded 9% and was as high as 21%.

Settle order, suggesting a reasonable attorney's fee supported by an affidavit of services.

Dated: September 16, 1983

(iii) Copy of judgement of the Court of Appeals, State of New York No. 171, appealed from, entered May 16, 1985.

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

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1 No. 171

ADVENTURERS WHITESTONE CORPORATION
Respondent,
v.
THE CITY OF NEW YORK,
Appellant.

The appellant in the above entitled appeal appeared by Hon. Frederick A.O. Schwarz, Jr., Corporation Counsel; the respondent appeared by Alfred D. Jahr and Herman Itskowtiz, Esqs.

The court after due deliberation, orders and adjudges that the order is reversed, with costs, and compaint dismissed. Opinion by Judge Meyer. Chief Judge Wachtler and Judges Jasen, Simons, Kaye and Alexander concur.

The Court further orders that the papers required to be filed and this record of the preceedings in this Court be remitted to the Supreme Court, New York County, there to be

proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Kathryn C. Brown, Deputy Clerk

Court of Appeals, Clerk's Office, Albany, May 16, 1985

(iv) Copy of the Notice of Appeal filed with the Clerk of the Court of Appeals of the State of New York, by mail on August 6, 1985 filed with the County Clerk, New York County, State of new York by mail on August 6, 1985, and personally served on the Appellee, the City of New York, on August 6, 1985.

NOTICE OF APPEAL

In the Supreme Court of the United States
OCTOBER TERM, 1985

ADVENTURERS WHITESTONE CORPORATION
Appellant,
v.
THE CITY OF NEW YORK,
Appellee.

PLEASE TAKE NOTICE that the Plaintiff Adventurers Whitestone Corporation hereby appeals to the Supreme Court of the United States from the judgment of the Court of Appeals of the State of New York entered May 16, 1985 and is taken from each and every part of said judgement as well as from the whole thereof. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Dated New York, N.Y.

August 6, 1985

Yours, Etc.

M. ROBERT GOLDSTEIN
Attorney for
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TO: FREDERICK A.O. SCHWARZ, JR.
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Clerk, Court of Appeals, State of New York
20 Eagle Street
Albany, New York 12207

County Clerk, New York County
New York County Court House
Center and Pearl Street
New York, N.Y. 10007

(2)

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-244

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ADVENTURERS WHITESTONE CORPORATION,

Appellant,

vs.

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

FREDERICK A. O. SCHWARZ, JR.,
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Tel. (212) 566-4338

LEONARD KOERNER,
JOSEPH I. LAUER,
PETER MOUND,
ANDREW SCHWARTZ,
of Counsel.

October 9, 1985

BEST AVAILABLE COPY

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No. 85-244

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ADVENTURERS WHITESTONE CORPORATION,

Appellant,

vs.

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

Pursuant to Rule 16.1 of the Rules of this Court, the appellee, the City of New York ("City"), moves that the appeal be dismissed, or in the alternative that the judgment of the New York Court of Appeals be affirmed.

STATEMENT OF THE CASE

(1)

Appellant, Adventurers Whitestone Corporation (hereafter "Adventurers"), attacks the interpretation placed by the New York State Court of Appeals on General Municipal Law, Sec. 3-a(2). This statute provides:

> The rate of interest to be paid upon any judgment or accrued claim against the municipal corporation arising out of condemnation proceedings or action to recover damages for wrongful death shall not exceed six per centum per annum.

Pursuant to this statute, the courts have held that the 6% statutory rate is binding on a condemnee unless the condemnee introduces proof to overcome the presumed correctness of the rate during the litigation of its claim for just compensation. Matter of City of New York (Brookfield Refrigeration Corporation), 58 N.Y. 2d 532, 449

N.E. 2d 399, 462 N.Y.S. 2d 619 (1983); City of Buffalo v. Clement Co., 28 N.Y. 2d 241, 269 N.E. 2d 895, 321 N.Y.S. 2d 345 (1971). This interpretation follows the mandate of this Court that interest is part of judicially required just compensation. Seaboard Air Line Ry. v. U.S., 261 U.S. 299 (1923).

(2)

Adventurers was a condemnee which did not express dissatisfaction with the 6% statutory rate during the litigation of its claim for just compensation. However, after it accepted its condemnation award with 6% interest added up to the date of availability of payment, it commenced a plenary action for additional interest. The Court of Appeals ordered the dismissal of the complaint in accordance with "usual principles of claim preclusion" (res judicata), finding Adventurers' plenary action to be an unlawful attempt to raise in a second action an issue which it could have raised in the condemnation proceeding itself. 65 N.Y. 2d 83, 89, 479 N.E. 2d 241, 245, 489 N.Y.S.2d 896, 900

(1985) (App. A9).* The Court of Appeals also made reference to the doctrine that, although prejudgment interest on a condemnation award is required by the just compensation clause of the Federal and State Constitutions, postjudgment interest is payable under the statute to compensate for delay in payment of the award. 65 N.Y. 2d 83, 85, 479 N.E. 2d 241, 242, 489 N.Y.S. 2d 896, 897 (App. A2-3). Since Adventurers received both pre- and postjudgment interest and had elected not to contest the statutory rate in the condemnation proceeding, it was held not entitled to maintain a subsequent action for additional interest.

Adventurers alleges that, as applied to it, the Court of Appeals' interpretation of General Municipal Law, Sec. 3-a(2), is repugnant to the Fifth and Fourteenth Amendments of the Constitution of the United States.

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*Appendix references are to the Appendix to the Jurisdictional Statement. Page references to the statement itself will be preceded by "J.S."

(3)

Adventurers owned certain real estate in the City of New York, County of Queens. The City acquired this property on April 4, 1974 through the exercise of its power of eminent domain. Litigation of Adventurers' claim for just compensation was conducted in Queens County and continued until December 6, 1978 (J.S. 2). A judgment by the Trial Court, entered on July 18, 1979, awarded Adventurers $529,750 for its property. Appeals were taken by both Adventurers and the City. The Appellate Division modified the judgment to $573,850 and the Court of Appeals affirmed sub nom. Matter of City of New York (Glantz), 82 A.D. 2d 829, 439 N.Y.S. 2d 676 (2d Dept., 1981), aff'd 55 N.Y. 2d 345, 434 N.E. 2d 1036, 449 N.Y.S. 2d 669 (1982). Following the Court of Appeals' affirmance, the City made payment of the balance due Adventurers, with interest thereon included at 6% from the date of condemnation to the date of payment. Total payment amounted to $831,067.73.

In 1982, Adventurers collected the award. In 1983, it commenced a new action in New York County for additional interest of 3%. It was, and is, Adventurers' position that the issue of the rate of interest on a condemnation award need not be raised during the trial of a claim for just compensation, but may instead be the subject of a separate lawsuit after the condemnation judgment is entered and the award, inclusive of statutory interest to the date of payment, is collected.

In the new proceeding, Adventurers conceded that it had adduced no proof to overcome the presumed correctness of the 6% statutory interest rate during the litigation of its claim for just compensation, which resulted in the aforementioned judgment entered on July 18, 1979. Nevertheless, it contended that it was entitled to additional interest because, in 1981, a decision in a different county, and in an entirely different case, awarded 9% interest, as of January 1, 1978, to certain condemnees who, in contrast with Adventurers,

during litigation of their claims for just compensation introduced proof deemed sufficient to overcome the 6% statutory rate. South Bronx Neighborhood Development Plan, 110 Misc. 2d 571, 442 N.Y.S. 2d 869 (Sup. Ct., Bronx Co., 1981), aff'd 89 A.D. 2d 948, 454 N.Y.S. 2d 566 (1st Dept., 1982), aff'd sub nom. Matter of City of New York (Brookfield Refrigeration Corporation), 58 N.Y. 2d 532, 449 N.E. 2d 399, 462 N.Y.S. 2d 619 (1983).

Thus the New York courts were presented with the following question:

> may Adventurers, which collected its condemnation award, with statutory interest to the date of payment, without any challenge to the statutory rate, bring a subsequent plenary action for additional interest because of a later decision awarding interest at a higher rate to unrelated condemnees who challenged the statutory rate in a different condemnation proceeding?

The Court of Appeals answered this question in the negative. It recognized that payment to Adventurers had been postponed due to appeals from the judgment of the Trial Court. However, it did

not consider this circumstance as providing a basis for departure from the settled law that a condemnee who does not express dissatisfaction with the statutory rate of interest during the litigation of its claim for just compenstaion may not receive interest at a higher rate.

ARGUMENT

SINCE ADVENTURERS RECEIVED BOTH PRE- AND POSTJUDGMENT INTEREST ON ITS CONDEMNATION AWARD AT THE STATUTORY RATE BECAUSE OF ITS ELECTION NOT TO CONTEST THAT RATE DURING THE LITIGATION OF ITS CLAIM FOR JUST COMPENSATION, IT WAS CORRECT TO DISMISS ADVENTURERS' SUBSEQUENT COMPLAINT FOR ADDITIONAL INTEREST ON GROUNDS OF RES JUDICATA. IT FOLLOWS THAT DISMISSAL OF THE COMPLAINT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION. MOREOVER, THE APPLICATION OF RES JUDICATA IS AN ADEQUATE NON-FEDERAL BASIS FOR THE JUDGMENT.

(1)

This Court's practice of dismissing appeals for want of a substantial federal question is well established. As recently as 1977, this Court dismissed an appeal from a decision of the New York Court of Appeals which included the same determination which is the basis for the present appeal. Eveandra Enterprises, Inc. v. County of

Nassau, 42 N.Y. 2d 849, 366 N.E. 2d 287, 397 N.Y.S. 2d 627 (1977), app. dism. 434 U.S. 804 (1977).

The opinion states (42 N.Y.2d at 850, 366 N.E. 2d at 287-288, 397 N.Y.S.2d at 628):

> We agree ... that claimant has not demonstrated that the validity of the statutory prejudgment interest rate of 6% is constitutionally infirm. Compensation accruing at the time of vesting and for the period prior to an award in a condemnation proceeding "is payable as a substitute for the beneficial use of real property" (Matter of Rochester Carting Co. v. Levitt, 36 NY 2d 264, 268, 367 N.Y.S. 2d 242, 245, 326 N.E. 2d 808, 810). (Emphasis supplied)

There is no more substantiality to the questions presented here than existed in Eveandra. In that case the condemnee adduced proof during the litigation of its claim for just compensation seeking to overcome the presumed correctness of the 6% statutory interest rate. The judgment of the

trial court, which denied Eveandra interest in excess of 6%, was entered on June 26, 1975 (See 51 A.D. 2d 722, 378 N.Y.S. 2d 786 [2d Dept., 1976]).

In this case, Adventurers seeks review of the denial of interest in excess of 6% even though it elected not to challenge the 6% rate during the litigation of its claim for just compensation. It characterizes its nonfeasance in this respect as "not surprising" in view of the 1977 Court of Appeals decision in Eveandra (J.S. 3). However, Adventurers ignores the fact that, since the Eveandra judgment was entered on June 26, 1975, the period covered thereby did not account for economic conditions prevailing at a later date. Adventurers' judgment was entered on July 18, 1979, and the litigation of its claim for just compensation had continued until December 6, 1978. Adventurers points out that the litigation on December 6, 1978 consisted of a "Hearing on Objections" (J.S. 2), but that does not mitigate its lack of challenge or proof. It is the usual practice in New York City condemnation

proceedings to litigate the issue of rate of interest during the Hearing on Objections; and this may be done even if the issue was not raised earlier in the proceeding. Matter of City of New York (Brookfield Refrigeration Corporation), supra , 58 NY 2d at 535, 36, 449 N.E. 2d at 400, 462 N.Y.S. 2d at 620; Matter of City of New York (New Munic. Bldg.), 57 Misc 2d 156, 157, 291 N.Y.S. 2d 656, 657 (Sup. Ct., N.Y. Co., 1968), aff'd sub nom. Matter of City of New York (Manhattan Civic Center Area), 32 A.D. 2d 530, 299 N.Y.S. 2d 575 (1st Dept., 1969), aff'd 27 N.Y. 2d 518, 261 N.E. 2d 808, 313 N.Y.S. 2d 995 (1970). Thus, Adventurers had the opportunity to adduce proof to overcome the 6% rate at the December 6, 1978 hearing and failed to avail itself of that opportunity.

(2)

Adventurers claims that to require submission of proof as to the interest rate during the litigation of the claim for just compensation is repugnant to the just compensation clause of the Fifth Amendment and the due process clause of the

Fourteenth Amendment of the Constitution of the United States (J.S. I). It urges that this requirement deprived it of just compensation and due process because appeals caused postponement of payment until 1982. Between the date of judgment and the date of payment, the Brookfield decision was handed down; and it provided for interest at 9% as of January 1, 1978 (J.S. 3). Adventurers proposes the novel theory that a condemnee who expresses no dissatisfaction with a statutory rate during the litigation of its claim for just compensation and collects its condemnation award, including prejudgment interest at the statutory rate and postjudgment interest at the same rate, should thereafter be permitted to make a subsequent claim for interest at a higher rate. No authority has been found to support Adventurers' theory that a condemnee may split its cause of action for just compensation by making its claim for interest or "delay compensation" the subject of a separate post judgment and post payment action.

Kirby Forest Industries, Inc. v. United States, 467 U.S._____, 104 S. Ct. 2187 (1984), relied on by Adventurers, does not support its position (J.S. I). In Kirby Forest, this Court pointed out that, when land value changes materially between the date of valuation and the date the judgment is paid, the effect of this interim change in value should be accounted for. However, as noted by the Court of Appeals, Adventurers' action here is "separate and apart from the condemnation proceeding and ... is predicated on a change in interest rate rather than a change in value," 65 N.Y. 2d at 88, n. 4, 479 N.E. 2d at 244, 489 N.Y.S. 2d at 899 (App. A6-7). Secondly, there was no change in the applicable rate between the conclusion of the litigation of Adventurers' claim for just compensation and its collection of payment. Brookfield, decided by the trial court on August 7, 1981 (110 Misc. 2d 571, 442 N.Y.S. 2d 869, supra), held that condemnees who introduced proof to overcome the 6% statutory rate during the litigation of their claims for just compensation

established that economic conditions prevailing after January 1, 1978 entitled them to 9% interest as of that date. Brookfield also held that this proof was insufficient to support a rate in excess of 9% subsequent to 1978. Litigation of Adventurers' condemnation claim continued until December 6, 1978. Adventurers' judgment was entered on July 18, 1979. After the appeals were disposed of, payment was made in 1982. There was no change in the interest rate during the interim period. The controlling reason for denying to Adventurers interest in excess of 6% is that it did not raise the issue of interest rate in the condemnation proceeding. In discussing Kirby Forest further, the Court of Appeals indicated its recognition of the due process issue raised by Adventurers.

Specifically, the Court of Appeals stated (65 N.Y. 2d at 88, n. 5, 479 N.E. 2d at 244, 489 N.Y.S. 2d at 899; App. A7):

> When the constitutional interest issue has been raised before the

> condemnation court and during the time necessary to dispose of the appeal the interest rate undergoes a substantial upward change, it may, therefore, be necessary to accord the claimant a further hearing at which that fact can be established.

However, Adventurers did not raise the interest issue before the condemnation court; nor did the rate undergo an upward change while Adventurers' judgment was on appeal. Consequently, the abovementioned concept is not applicable to Adventurers.

Adventurers' position is not supported by Brown v. United States, 263 U.S. 78 (1923) (J.S. 8). In that case, the change in time between the fixing of value and payment refers to the value of the real estate, not the interest rate. As to interest, Brown gives approval to the inclusion of interest to the date of judgment, Id. at 80.

Matter of City of New York (Chrystie Street), 264 N.Y. 319, 190 N.E. 654 (1934) (J.S. I, 5) is also of

no assistance to Adventurers. That case involved the construction of a statute which cuts off interest on a condemnation award entirely six months after a condemnation decree was entered unless a demand for additional interest is made. The Court of Appeals interpreted this statute to permit the six month period, in the case of a condemnation award modified on appeal, to run from the date of modification. Neither the statute nor its interpretation is applicable here where Adventurers received interest on its award to the date of payment. Chrystie Street does not support the theory that a condemnee, who does not raise the issue of interest rate during the condemnation proceeding, may sue subsequently for interest at a rate higher than that paid pursuant to the condemnation judgment regardless of whether that judgment is modified on appeal.

(3)

Adventurers' appeal should be dismissed because the order appealed from rests on an adequate and independent state ground. The New

York Court of Appeals held that Adventurers' claim for additional interest on its condemnation award should have been raised at the condemnation trial and was thus barred by res judicata.

The dismissal of Adventurers' suit on the basis of "claim preclusion" (res judicata) requires dismissal of this appeal. This Court has long held that the prohibition on advisory opinions and the partitioning of power between the federal and state systems require the dismissal of an appeal when the decision below rests on "adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Michigan v. Long, 463 U.S. 1032, 1041 (1983); Henry v. Mississippi, 379 U.S. 443, 446-448 (1965).

Central to the New York Court's decision is the holding that, under New York law, Adventurers' suit is barred by res judicata: "Here plaintiff neither raised the question of the rate of interest constitutionally required in the condemnation proceeding nor preserved by stipulation its right to litigate the issue in another forum. Its claim to the

higher rate of interest is, therefore, barred by res judicata" (65 N.Y. 2d at 91, 479 N.E. 2d at 246, 489 N.Y.S. 2d at 901; App. A11). Since Adventurers did not raise the constitutional issue at its condemnation trial, it has waived the right to raise it in a subsequent law suit. This case is similar to numerous other cases in which this Court held that the waiver of a federal claim by failure to raise it at the proper time below constitutes an adequate state ground precluding review. Illustrative of the cases where procedural failure under state law precluded Supreme Court review are: Parker v. North Carolina, 397 U.S. 790, 798 (1970) (a failure to object to the composition of a grand jury before the entry of a guilty plea); Herndon v. Georgia, 295 U.S. 441 (1935) (a failure to preserve the issue for appeal, such as by properly making exceptions or assigning errors); Louisville & Nashville R.R. v. Woodford, 234 U.S. 46 (1914) (the raising of a federal issue for the first time in the appellate court, without bringing it to the trial court's attention).

The principle of res judicata was properly applied in the instant case. In answer to its claim that it could not have litigated the interest issue in the condemnation proceeding, the Court of Appeals stated: "Indeed, the interest issue has been litigated before the condemnation court in a number of cases (Matter of City of New York [Brookfield Refrig. Corp.], 58 NY 2d 532 [449 N.E. 2d 399, 462 N.Y.S. 2d 619], supra; Matter of City of New York [Roteeco Corp.], 33 NY 2d 970 [309 N.E. 2d 135, 353 N.Y.S. 2d 736], Matter of City of New York [Manhattan Civic Center Area], 27 NY 2d 518 [261 N.E. 2d 808, 313 N.Y.S. 2d 995], affg 32 AD 2d 530 [299 N.Y.S. 2d 575], affg 57 Misc 2d 156 [291 N.Y.S. 2d 656]. There was, therefore, no bar to plaintiff's raising the issue in the Queens proceeding" (65 N.Y. 2d at 89, 479 N.E. 2d at 245, 489 N.Y.S. 2d at 900; App. A8-9).

The test for adequacy of the state ground is also met by res judicata. Adequacy requires that, if the Supreme Court were to rule on the federal

question in the case, it would not affect the outcome below; and thus such ruling would merely be an advisory opinion. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977). A ruling here that postjudgment interest is part of constitutionally required just compensation would not lift the bar to Adventurers' suit.

Finally, to be deemed independent, the state court's ruling must be founded on state law and supported by state court precedent. A reading of the decision below demonstrates that the court's ruling here was reached pursuant to an interpretation of New York City Administrative Code §B15-28.0 and applicable New York case law concerning res judicata. (See App. 9-11 for citation of cases.) The fact that the New York court reached the federal question presented in the case does not change the analysis. Where both federal and state grounds are present in a case, the Court will dismiss if the non-federal ground adequately supports the decision and its independence is

apparent from the "four corners of the opinion." Michigan v. Long, supra, 463 U.S. at 1040

(4)

Although General Municipal Law, Sec 3-a(2), limits a condemnation award to 6% per annum, the New York courts' interpretation of the statute permits interest at a higher rate to condemnees who overcome the presumed correctness of the statutory rate during the litigation of their claims for just compensation. As so interpreted, the statute is not repugnant to the Constitution of the United States. Adventurers was limited to 6% interest on its award because it did not claim interest in excess of 6% during the condemnation proceeding. It follows that Adventurers' appeal does not present a substantial federal question and should be dismissed.

(5)

The determination that postjudgment interest is not part of constitutional just compensation is not repugnant to the United States Constitution. Adventurers concedes that this ruling follows prior

decisional law in New York State and in other jurisdictions (J.S. 10, 11 [footnotes]). Matter of Rochester Carting Co. v. Levitt, 36 N.Y. 2d 264, 326 N.E. 2d 808, 367 N.Y.S. 2d 242 (1975), is the New York decision, cited in Adventurers to support the Court of Appeals' conclusion as to postjudgment interest (65 N.Y. 2d at 87, 479 N.E. 2d at 243, 489 N.Y.S. 2d at 898; App. A5-6).

In Rochester Carting, the Court of Appeals upheld a statute permitting interest to be cut off entirely 20 days after the State Comptroller is authorized to issue a warrant for payment of a condemnation award. The opinion points out that there is no common law right to interest on a judgment (36 N.Y. 2d at 267, 326 N.E. 2d at 810, 367 N.Y.S. 2d at 245).

Adventurers cites cases decided by this Court wherein the government sought to avoid payment of interest entirely. Seaboard Air Line Ry. v. U.S., 261 U.S. 299 (1923); Brown v. United States, 263 U.S. 78 (1923). None of the authority relied on involves a

situation such as that present here: where condemnee received pre- and postjudgment interest at the statutory rate, thereby silently acquiescing to that rate during the litigation of its claim for just compensation. Since this acquiescence provides an "adequate and independent state ground" to support the order appealed from (supra), and since Adventurers here received postjudgment interest to the date of payment, there is insufficient basis for the instant appeal.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction. Alternatively, the judgment of the Court of Appeals should be affirmed.

Dated: October 9, 1985

Respectfully submitted,

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